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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re J.N., a Person Coming Under the Juvenile
Court Law.

KINGS COUNTY HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

JENNIFER M.,

Defendant and Appellant.

F073096

(Super. Ct. No. 08JD0074)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Jennifer L. Giuliani, Judge.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant.

Colleen Carlson, County Counsel, and Risé A. Donlon, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer M. (Mother)¹ appeals from an order terminating her parental rights over her seven-year-old daughter J.N. with adoption as the permanent plan. Mother contends the order must be reversed because the juvenile court erred in failing to apply the beneficial relationship exception to adoption. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)² We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. November 2008: First Time J.N. Removed from Mother's Custody and Prior Dependency Case

Mother and J.N. both tested positive for methamphetamine at the time of J.N.'s birth in November 2008. Shortly thereafter, the Kings County Human Services Agency (the Agency) took J.N. into protective custody and filed a dependency petition on her behalf. The previous month, the Agency detained J.N.'s half brother J.M. and filed a dependency petition on his behalf based on Mother's drug use and involvement in domestic violence.³ In May 2009, Mother regained custody of J.N. and J.M. under a family maintenance plan. In October 2009, the dependency cases were terminated and Mother was granted sole legal and physical custody of J.N. and J.M.

B. November 2012: Second Time J.N. Removed from Mother's Custody and Current Dependency Case

The Agency removed J.N. from Mother's care a second time and filed a dependency petition on her behalf in November 2012, after Mother gave birth to her second drug-exposed child, J.C.1.

¹ In this opinion, certain persons are identified by initials, abbreviated names and/or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

² Further statutory references are to the Welfare and Institutions Code.

³ At this time, Mother also had two older children who lived with their maternal grandmother under a legal guardianship and who were not part of any of the proceedings in this case.

In January 2013, the juvenile court assumed dependency jurisdiction over J.N. and her half siblings, J.M. and J.C.1, under section 300, subdivision (b) (failure to protect), and ordered the Agency to provide reunification services for Mother.

After the contested six-month review hearing in October 2013, the juvenile court found that Mother had failed to make substantial progress in her case plan and to demonstrate a change of behavior, as evidenced by a positive drug test and recent failure to test. The court terminated reunification services and set a section 366.26 hearing.

C. July 2014: J.N. Returned to Mother's Custody with Family Maintenance Services

In May 2014, Mother prevailed on her section 388 petition to reinstate reunification services and vacate the section 366.26 hearing, which she filed after giving birth to her youngest child, J.C.2, in December 2013. Based on recent progress Mother had made in substance abuse treatment programs and other services, the Agency determined that J.C.2, who was not born drug exposed, could remain safely in Mother's care with family maintenance services.

Despite Mother's progress in her rehabilitation efforts around the time of J.C.2's birth, the Agency opposed Mother's petition to reinstate reunification services as to J.N. and her half siblings, J.M. and J.C.1. In February 2014, the Agency filed a response to Mother's petition, pointing out that, unlike J.C.2, J.N., J.M., and J.C.1 were in the permanency planning stage of their dependencies, when the focus is on permanency and stability, not reunification, and each child had been stable in their separate placements for over six months with care providers who were committed to adopting them and providing them with nurturing permanent homes.

In July 2014, the juvenile court ordered J.N. to be returned to Mother's care under a family maintenance plan, which included domestic violence counseling for victims. Mother likewise regained custody of J.N.'s half siblings, J.M. and J.C.1, the following month.

D. April 2015: Third Time J.N. Removed from Mother's Custody and Sections 342 and 387 Petitions

Mother was still receiving family maintenance services when J.N. was removed from Mother's care for the third and final time on April 22, 2015, along with her half siblings, J.M., J.C.1, and J.C.2. The Agency filed sections 342 and 387 petitions on behalf of the children, alleging the previous order of family maintenance services was no longer appropriate because J.C.1 sustained non-accidental bruising on her chin and cheek while in Mother's care.

The jurisdiction/disposition report included information that J.N. too had sustained a suspicious bruise on her chin while in Mother's care in April 2015. After initially claiming to have fallen, J.N. told the school nurse that Mother had hit her. Later, Mother and J.N. both told the social worker that J.N. had injured herself accidentally by falling into a play kitchen table in her bedroom. Although he was not a witness to what happened, J.M. made a statement to the social worker similar to those of Mother and J.N.

After a continued jurisdiction/disposition hearing in July 2015, the juvenile court found the allegations of the sections 342 and 387 petitions to be true as to Mother. The court awarded custody of J.C.1 and J.C.2 to their father and terminated dependency jurisdiction over those children. As to J.N. and J.M., the court denied reunification services and set a section 366.26 hearing in November 2015. The hearing as to J.M. was later continued to a date in 2016, and is not at issue in the current appeal.

E. November 2015 and December 2015: Reports for the Section 366.26 Hearing

On November 6, 2015, the Agency filed a report in anticipation of the section 366.26 hearing. The Agency reported that J.N. had been in a total of four placements since her initial removal from Mother in early November 2008, when she was three days old. Since her initial removal, J.N. had been removed two other times and all her placements had been with relatives or Non-Related Extended Family Members

(NREFM). J.N. was currently placed with a NREFM, while the Agency looked for a permanent placement.

The Agency further reported that there was currently a relative who wished to adopt J.N. and was starting the process for “Resource Family Approval.” However, if the home was not approved, there were many families in the community that would be a good fit for J.N., who was adoptable. The seven year old had a sweet demeanor and no developmental delays or medical issues other than the need for therapy.

The Agency listed the dates Mother visited with J.N. and the other children and described the visits as appropriate. The only visit where a concern was noted was on July 24, 2015, when a social worker heard mother discussing the case with J.N. and telling J.N. she would be coming home. When the social worker intervened, Mother looked upset but stopped the conversation with J.N.

In an addendum report filed on December 10, 2015, the Agency reported that J.N. had been placed with a paternal relative on November 19, 2015, and that J.N. was adjusting well in the new placement. The caregivers were committed to adopting J.N., if parental rights were terminated, and wished to keep her safe and give her a permanent and stable home.

F. December 15, 2015: The Section 366.26 Hearing

At the continued section 366.26 hearing on December 15, 2015, the parties stipulated that there was clear and convincing evidence J.N. was an adoptable child.

The Agency then called Mother to testify. Mother testified that J.N. was first removed from her care at the time of her birth and was returned about four or five months later. The next time J.N. was removed was in November 2013, after which she remained out of Mother’s care for 18 months. The last time J.N. was removed was in April 2015.

Mother confirmed that she had recently tested positive for methamphetamine, “like six months ago.”

Mother had visited with J.N. once a month since July 2015. The visits were good. Mother considered J.N. to be a resilient and good child. J.N. did very well in school and had lots of friends. Mother did not have any information about how J.N. was doing in her current placement.

During cross-examination by her counsel, Mother testified that J.N. called her “Mommy” and would run to her at the beginning of their monthly visits and would act sad and cry when the visits ended.

The Agency next called adoptions worker Sabrina Dequattro, who was currently assigned to J.N.’s case. According to Dequattro’s testimony, the current caretakers, who included a paternal steppaunt of J.N., were interested in adopting J.N. Although she had only been in the placement since November 19, 2015, J.N. already had a positive relationship with the caretakers, who had gotten to know her during her previous 18-month placement with other paternal relatives.

Dequattro opined that J.N. would benefit from being adopted and in a stable and permanent home. Dequattro noted that the family with whom J.N. was currently placed had children of their own and that J.N. appeared to be adjusting well, even though she had only been in the placement for a short amount of time.

G. The Juvenile Court’s Ruling

After listening to the arguments of counsel, the juvenile court rejected Mother’s claim that the beneficial relationship exception to adoption should be applied to preclude termination of her parental rights, explaining:

“At this selection and implementation hearing the requirement of the Court is to release the child for adoption if it’s found the child is adoptable, unless one of the enumerated exceptions in the Welfare and Institutions Code applies. And the one I hear argument about the most is the parental relationship exception and that exception specifically requires that there be evidence of detriment in terminating the parental rights. And the suggestion today is that because [J.N.] lived with her mom for a majority of her lifetime and she calls her mommy and she runs to her at the beginning

of the visit and she cries at the end of the visit is somehow evidence of detriment. And I would suggest that may be evidence of a strong relationship or bond, but I don't believe that there is any evidence that is before the Court that addresses specifically the issue of detriment to [J.N.]. There's evidence before the Court that discusses the relationship between the mother and [J.N.], but it stopped there. And there was no additional evidence that was presented with regard to how terminating parental rights would be detrimental. Just that because she's lived with her mom as long as she has, obviously, it must be detrimental and I don't believe that's supported by the case law. I don't believe that any of the cases would suggest that that is sufficient evidence to establish, somehow, that there would be detriment in the termination of parental rights. Absent the evidence that would support a finding of detriment, the Court is required to follow the law, which is for the termination, as much as it saddens me to do so."

The juvenile court terminated parental rights. Mother now appeals.

DISCUSSION

Mother contends her parental rights were wrongly terminated because the juvenile court failed to apply the beneficial relationship exception to adoption. We disagree.

A. Applicable Law

At a permanency planning hearing, once the juvenile court finds by clear and convincing evidence that the child is likely to be adopted within a reasonable time, the court is required to terminate parental rights and select adoption as the permanent plan, unless the parent shows that termination of parental rights would be detrimental to the child under one of several statutory exceptions. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*)) One of these statutory exceptions is the beneficial relationship exception to adoption, which applies when it would be detrimental to the child to terminate parental rights if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The burden is on the party seeking to establish the beneficial relationship exception to produce evidence establishing the exception is applicable. (*Bailey J., supra*, at p. 1314.) Once the juvenile court finds that a parent has met his or

her burden to establish the requirements of the beneficial relationship exception, the juvenile court may choose a permanent plan other than adoption if it finds the beneficial relationship to be “a compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B); see *Bailey J.*, *supra*, at p. 1314.)

The beneficial relationship exception occurs when a significant parent-child relationship is found to exist. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)). The juvenile court must then engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425; see *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154-1156.)

B. Standard of Review

Because the appropriate standard of review is somewhat confusing, we set it out in detail here. On appeal after a court has rejected a parent’s efforts to establish the exception, two different standards of review apply. (See *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622 (*K.P.*); *Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314.) Since the parent must show the existence of a beneficial parental relationship, which is a factual issue, we uphold a court’s express or implied finding that there is no beneficial relationship if supported by substantial evidence. (*K.P.*, *supra*, at pp. 621-622; *Bailey J.*, *supra*, at p. 1314.) More specifically, a challenge to a court’s failure to find a beneficial relationship amounts to a contention that the “undisputed facts lead to only one conclusion.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1529.) Thus, unless the undisputed facts establish the existence of a beneficial parental relationship, a substantial evidence challenge to this component of the juvenile court’s determination cannot succeed. (*Bailey J.*, *supra*, at p. 1314.)

The second requirement for the exception is that the beneficial parental relationship constitute a “compelling reason for determining that termination would be detrimental” (§ 366.26, subd. (c)(1)(B); *K.P.*, *supra*, 203 Cal.App.4th at p. 622.)

Although grounded in the facts, the court's determination of this issue is a "quintessentially" discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court's decision is discretionary, the abuse of discretion standard of review applies." (*Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315; see also *K.P.*, *supra*, at p. 622.)

For instance, when a parent has had custody of the children and visited consistently when he or she did not have custody, and had an established bond recognized by the agency workers, substantial evidence supports the first requirement for application of the statutory exception. (*K.P.*, *supra*, 203 Cal.App.4th at p. 622.) The determination then becomes whether, under the facts of the case, there is a compelling reason for the court to order a plan other than adoption, and whether the court abused its discretion in failing to do so. (*Id.* at pp. 622-623.) In simplest terms, the establishment of the beneficial parental bond exception depends upon a parent having developed such a beneficial bond that it would be detrimental to sever it. The benefit from continuing the child's relationship with the parent would outweigh any benefit the child derived from his or her adoption. (§ 366.26, subd. (c)(1)(B)(i); *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

C. Analysis

It is undisputed that Mother met her burden of establishing that she "maintained regular visitation and contact" with J.N. (§ 366.26, subd. (c)(1)(B)(i).) Mother's contention on appeal is that the juvenile court erred in not applying the beneficial relationship exception to adoption because she presented sufficient evidence to show that J.N. would benefit from continuing the relationship with Mother. (*Ibid.*) Mother argues a beneficial parent-child bond was established by the circumstances that J.N. lived the

majority of her life in Mother's custody, that she called Mother "Mommy," and that she would run up to Mother at the beginning and cry at the end of visits.

It is true the juvenile court stated that these particular circumstances "may be evidence of a strong relationship or bond." However, the court went on to state that the evidence "stopped there" and "there was no additional evidence that was presented with regard to how terminating parental rights would be detrimental." It thus appears that the court did not so much conclude that Mother failed to prove the existence of a beneficial relationship as it essentially concluded that Mother had failed to establish the second requirement for application of the exception by presenting evidence showing that the relationship between Mother and J.N. constituted a "compelling reason for determining that termination would be detrimental" (§ 366.26, subd. (c)(1)(B); *K.P.*, *supra*, 203 Cal.App.4th at p. 622.) As mentioned above, the court's determination of this issue is a discretionary decision.

We see no abuse of discretion in the juvenile court's decision not to apply the beneficial relationship exception to adoption in this case. As the juvenile court observed, there was no evidence that severing the bond between Mother and J.N. would be detrimental to J.N., and none of the circumstances Mother cites on appeal demonstrate that the benefits to J.N. of adoption would be outweighed by the detrimental impact Mother presumes would occur as a result of their relationship being severed. While J.N. apparently enjoyed visits with Mother and was sad when they ended, these circumstances, which the court recognized as possible evidence of a strong bond or relationship between Mother and J.N., failed to establish that the bond, while of some benefit, was worth denying J.N. an opportunity for a stable and loving home.

We also find to be unpersuasive Mother's claim that detriment was established by evidence that J.N. engaged in self-harming behavior "upon removal from [M]other, and her need for therapy to withstand being separated from [Mother]." The record citations Mother offers do not directly support her claim. For example, Mother cites to a page in

the section 366.26 report which contains the following brief summary of J.N.'s mental and emotional status:

“On 05/28/2015, the [NREFM] ... expressed concern regarding [J.N.] possibly pinching herself causing redness on her stomach. Additionally, [J.N.] becomes upset after visitations with her mother and cries when leaving the visit. On said date, [the social worker] referred [J.N.] to receive a mental health assessment at Kings View Counseling Services. [J.N.'s] appointment was set for 06/10/2015. At this appointment, it was determined that [J.N.] would benefit from therapy. She now meets with her therapist biweekly for individual counseling.”⁴

As can be seen, the report does not explain precisely how J.N.'s self-harming behavior was connected to her relationship with Mother or why it was determined J.N. would benefit from therapy, let alone establish the asserted fact that J.N. needed therapy in order to *withstand* being separated from Mother.

However, even assuming J.N. did need therapy to address the emotional distress she experienced upon being separated from Mother, evidence of such distress did not necessarily compel the conclusion that J.N.'s relationship with Mother was a positive one or that severing it would be detrimental to J.N. Without additional evidence, it was not unreasonable for the juvenile court to find that evidence of J.N.'s emotional upset at the end of visits with Mother was insufficient, by itself, to establish that it would be detrimental to J.N. to terminate Mother's parental rights.

In other words, Mother, who bore the burden of proving the beneficial relationship exception was applicable, failed to present any evidence which would have allowed the juvenile court to conclude that the reported self-harming behavior by J.N. and assessed need for therapy was evidence of a beneficial relationship with Mother or that the

⁴ Mother also cites to a page in an addendum report filed on June 4, 2015, which contains a similar summary regarding J.N.: “On 05/28/2015, the [NREFM] ... expressed concern regarding [J.N.] possibly pinching herself causing redness on her stomach. Additionally, [J.N.] becomes upset after visitations with her mother and cries when leaving the visit. On said date, the [social worker] referred [J.N.] to receive a mental health assessment at Kings View Counseling Services.”

expected impact of severing the relationship would outweigh the benefits of adoption. Thus, we cannot say the court abused its discretion in finding Mother failed to present any evidence of detriment based on these particular circumstances.⁵

Finally, we find unconvincing Mother's attempt to analogize this case to *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*). In *S.B.*, a three year old was removed from the custody of her father who had been her primary caregiver. The father immediately acknowledged his drug use was untenable and fully complied with the case plan, achieved sobriety, and regularly visited his daughter three days a week. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 293-295, 298.) A year after living apart from father, the child continued to become upset and wanted to go home with her father at the end of each visit. (*Id.* at p. 298.) The appellate court reversed the termination of parental rights, finding substantial evidence to support application of the section 366.26, subdivision (c)(1)(B)(i) exception based on the emotionally significant relationship nurtured in frequent and loving visits between parent and child. The court's decision was based on evidence of a true parental relationship developed during the first three years of the child's life, when she lived with her father, that continued to flourish when they lived apart. (*S.B.*, *supra*, at pp. 298-299.) Based on this record, the court concluded, "[T]he only reasonable inference is that [the child] would be greatly harmed by the loss of her significant, positive relationship with [her father]." (*Id.* at p. 301.)

⁵ We also reject as without merit, Mother's assertion that "the court's finding that there was no evidence of detriment was undermined by its own earlier findings to the contrary." In this regard, Mother relies on statements the juvenile court made at the hearing in May 2014, when it granted Mother's contested section 388 petition to reinstate reunification services. The applicability of the beneficial relationship exception to adoption was not before the court at the time of the earlier hearing, which involved completely different legal issues and circumstances than those before the court at the time of the section 366.26 hearing more than a year later. Mother has cited no authority or offered any persuasive reason supporting her suggestion that the court's favorable comments at the hearing on her section 388 petition in May 2014 were somehow binding on the juvenile court or undermined any aspect of the court's unfavorable ruling at the section 366.26 hearing in December 2015.

Since its publication, *S.B.* has been subject to considerable criticism, particularly for its suggestion the beneficial parental relationship exception to adoption applies if the child will merely “derive[] some measure of benefit” from the parental relationship. (*S.B.*, *supra*, 164 Cal.App.4th at p. 301.) Indeed, the appellate court that published *S.B.* has acknowledged that litigants have inaccurately and improperly cited its language in the decision. (*In re C.F.* (2011) 193 Cal.App.4th 549, 558.) In repeatedly emphasizing that *S.B.* “is confined to its extraordinary facts,” that appellate court has stated that *S.B.* “does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact.... [C]ontact between parent and child will always ‘confer some incidental benefit to the child,’ but that is insufficient to meet the standard.” (*In re C.F.*, *supra*, at pp. 558-559; see *In re Jason J.* (2009) 175 Cal.App.4th 922, 937 [stating the same].)

We conclude that *S.B.* is inapposite to the case before us. J.N. was removed from Mother for the first time when she was only three days old, after testing positive for methamphetamine. Even though J.N. was returned to Mother’s care several months later and thereafter lived with Mother for a stretch of three years, that time was cut short by Mother’s delivery of another drug-exposed infant, when J.N. was again removed from Mother’s care and the current dependency action was initiated. Mother thereafter failed to complete her case plan and had her reunification services terminated. However, due to Mother’s successful rehabilitation efforts around the time of the birth of her youngest child, the court gave Mother another chance to have reunification services and eventually custody of J.N. and her other half siblings. This reunion lasted less than a year before J.N. and her half siblings were again removed from Mother’s custody based on sustained allegations of physical abuse perpetrated by Mother against J.N.’s half sister, J.C.1.

Moreover, although the time J.N. spent in Mother’s care might have *cumulatively* constituted the majority of her young life, it was not a time of uninterrupted stability.

Despite multiple opportunities to participate in services, Mother repeatedly relapsed into harmful behaviors, both towards herself and her children, injecting instability and disruption into their home lives. Mother's conduct resulted in J.N. having a parent who was essentially in and out of her life, while committed relatives and NREFM's would step in to do the real work of parenting and providing a stable home environment for J.N. each time Mother's endangering conduct necessitated the child's removal from her care. As Mother acknowledges, between the time of J.N.'s birth in November 2008 and the time of the section 366.26 hearing in December 2015, J.N. had been removed three times and spent approximately two and a half years living outside Mother's custody, which is not an insignificant amount of time in the life of a seven year old. Mother simply bears no resemblance to the father in *S.B.*

Adoption is the preferred permanent plan for children. (*In re Marina S.* (2005) 132 Cal.App.4th 158, 164.) J.N. deserved to have her custody status promptly resolved and her placement made permanent and secure. Given all of the facts of this case, we conclude the juvenile court did not abuse its discretion in failing to apply the beneficial relationship exception to adoption.

DISPOSITION

The order terminating parental rights is affirmed.

WE CONCUR:

GOMES, J.

SMITH, J.

HILL,